IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

Mat.Appeal.No. 212 of 2007()

OP.8/2001 of FAMILY COURT, KOTTAYAM
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PETITIONER: APPELLANT/IST RESPONDENT

RAJU, AGED 62 YEARS, S/O.SWAMY,
SURESH BHAVAN, PUTHANANGADY VELOOR KARA,
KOTTAYAM VILLAGE.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.LIJI.J.VADAKEDOM

RESPONDENTS: PETITIONER AND THE 2ND RESPONDENT
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1. N.SANTHAKUMARI, W/O.RAJU,
SURESH BHAVAN, PUTHANANGADY, VELOOR KARA,
KOTTAYAM VILLAGE, KOTTAYAM TALUK.

2. SURESH, S/O.RAJU, SURESH BHAVAN,
PUTHANANGADI, VELOOR KARA, KOTTAYAM
DISTRICT.

BY ADV. SRI.V.P.MOHAMMED NIYAZ

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Kurian Joseph & T.R. Ramachandran Nair, JJ.

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Mat. A.NO. 212 of 2007

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Dated this the 2nd day of July, 2007

JUDGMENT

T.R. Ramachandran Nair, J.

This appeal arises from the judgment dated 13.12.2006 in O.P. No.8 of 2001 of the Family Court, Kottayam at Ettumanoor. The appellant is the first respondent before the Family Court. O.P.No.8 of 2001 was filed by the first respondent herein who is the wife of the appellant herein. The second respondent is their son.

2. As per the judgment, the O.P. was allowed and the first respondent was given a decree setting aside Ext.A1 gift deed No.2616/1988 and further declaring that Ext.A2 settlement deed is not binding on the appellant/first respondent and the petition schedule property. The appellant and second respondent herein have been directed to vacate the building within a period of two months from the date of the judgment. Challenging the same, this appeal is filed by the husband.

3. Heard counsels for the parties.

4. The case of the wife in brief was that she obtained the petition schedule properties as per sale deed No.1009/1997 of the Sub Registry

Office, Kottayam and she is in absolute possession and enjoyment of the same. The husband was doing business in the said building with her consent. While so, he executed a gift deed No. 2616/1988 by impersonation and by forging her signature and without her knowledge and consent. It is pleaded by her that impersonation was done with the aid of some other persons and she had never gone to the Sub Registry Office to sign the document. Thereafter, the husband had executed a settlement deed in favour of their son which is also not valid and not binding on her.

5. The contention of the appellant in nut shell is that the petition schedule property was obtained in the name of the wife in 1977 by paying consideration by the appellant. He denied the allegation that the gift deed was executed fraudulently. According to him, the gift deed is binding on the first respondent. The second respondent was set ex-parte.

6. After discussing the elaborate evidence adduced, the court below found that the first respondent has succeeded in establishing her claim in the property and accordingly a decree was passed.

7. Learned Senior Counsel appearing for the appellant argued that the evidence adduced are insufficient to hold that she had right in the property, that the transaction was only a benami one and therefore she is not entitled for recovery of the schedule property from him. Learned Senior Counsel

after referring to the evidence adduced, argued that no specific issue was raised before the Family Court regarding that aspect.

8. Ext.A1 is the gift deed, Ext.A2 is the settlement deed and Ext.A3 is the title deed of the property which stood in the name of the first respondent. The first respondent was examined as P.W.1. The evidence adduced by her discloses that she had filed a complaint before the police (Ext.A4) about the fraud and impersonation committed by the appellant herein in executing Ext.A1. The report of the finger print expert, Ext.A7 shows that on a comparison of the thumb impression of the first respondent with the disputed thumb impression revealed that the disputed one is not identical with the specimen thumb impression of her. In the criminal case registered as C.C. No.3/2003 against the appellant herein, the Chief Judicial Magistrate's Court, Kottayam convicted him for offences under Sections 463, 468 and 479 I.P.C. Ext.A17 is the copy of the judgment in that case. He suffered the punishment and did not file any appeal also. Apart from the above evidence, Exts.A11 to A15 are documents to show that the license of the business was in her name and the business stands in her name. Regarding her source of income to purchase the property, she deposed that she was conducting a chitty and she had sufficient income to purchase the property. (It is only a small extent of the land around 2 cents).

She also examined P.W.2 who is the Director of Finger Print Bureau who gave evidence that as per the order of the Chief Judicial Magistrate's Court in C.C. No.3/2003. Ext.A7 is the report prepared by him after examining the finger prints of the appellant. He also deposed that the the thumb impressions compared by him are not similar. Thus, the court below on an assessment of the above evidence, entered a clear finding in her favour.

9. We find that the approach made by the court below is perfectly in order. In fact, in his deposition before the Family Court, the appellant admitted that he was convicted by the criminal court for fabricating the gift deed Ext.A1. No worthwhile evidence was adduced by him to show that Ext.A3 was got executed as benami in the name of his wife by utilising his own fund. The court below found that apart from the interested testimony of the appellant, there is no evidence to support the above plea. It was also found that the appellant has not been successful in bringing out the circumstances leading to the execution of the document in the name of his wife. It is also clear that the appellant could not show the reasons as to why the document was not executed in his name if it was with his funds that the property was purchased. All the licenses stood in the name of his wife and the documents relied upon by him were created after the dispute between the parties arose. Further, there is evidence by way of Exts.A11 and A15 in

favour of the first respondent to show that she had the necessary licence for conducting the business in the schedule building. This was also accepted by the court below. Therefore, it is a case where there was total absence of any evidence on the part of the appellant to prove his case that the property was purchased as benami in the name of his wife. Therefore, the finding rendered by the court below on this aspect is a correct one and no interference is called for on the same. Even though the learned counsel for the appellant argued that the evidence adduced by the wife is not convincing, we are satisfied that she had been successful in discharging her burden in proving her case. As noted by the court below, the appellant could not produce any acceptable evidence to prove that the document was executed as benami.

10. The first respondent has been successful in proving her case that Ext.A1 document is vitiated by fraud and impersonation. As per the judgment of the Chief Judicial Magistrate's Court (Ext.A17) the appellant was found guilty of the offences charged and he has not challenged the same in appeal. The second accused in that case was one Ammini whose services have been utilised by the appellant for impersonation. Apart from P.W.1's evidence, there is evidence of P.W.2, the finger print expert. His report is marked as Ext.A7. Therefore, the evidence of P.W.1 is amply

corroborated by the above evidence. It has been clearly established that Ext.A1 gift deed has been got executed by impersonation. Therefore, the same is evidently vitiated by fraud and impersonation and hence the same was rightly set aside by the court below. There is no contrary evidence on the part of the appellant to disprove the above. The evidence adduced by the wife is trustworthy and convincing. For the same reasons, Ext.A2 settlement deed executed by Ext.A1 will also fall to the ground.

11. Even though learned Senior Counsel for the appellant argued that the court below has rendered these findings in the absence of a proper issue being framed, we are not impressed by the same. Obviously, the issues have been settled under Sub-rule (5) of Rule 1 of Order XIV C.P.C. after hearing both parties and the appellant had no objection at that time. It is also important to notice that sub-rule (5) of rule 1 of Order XIV confers power on the court to amend the issues or frame additional issues. The appellant had not moved the court to exercise any such power to amend the issues framed or to add additional issues. At any rate, the crucial question revolved round was the validity of the gift deed Ext.A1 and that of the settlement deed Ext.A2, for which proper issues have been framed. Therefore, merely because a separate issue was not framed regarding the alleged benami transaction raised by the appellant, no prejudice has been

caused by the said fact. It is well settled that in such circumstances, a technical plea of non-framing of such an issue will not vitiate the decree passed. This principle has been reiterated by the Apex Court in the decision reported in **Nagubai Ammal and others v. B. Shama Rao and others** (AIR 1956 SC 593), **Nedunuri Kameswaramma v. Sampati Subha Rao** (AIR 1963 SC 884) and **State of U.P. v. Mohammed Naim** (1964 SC 703). Their Lordships of the Supreme Court held in AIR 1963 SC 884 in paragraph 6 on the following terms:

> " Where the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. The suit could not be dismissed on this narrow ground, and also there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion and neither party claimed that it had any further evidence to offer."

Hence, we reject the contentions of the appellant on that score. Apart from that, both parties had led evidence in the matter and the appellant failed

miserably to prove by any cogent evidence that the schedule property was purchased benami and establish the circumstances which prevented him from executing the document in his name, if at all he was the real owner. To crown everything, the fact that he was convicted for fraud and impersonation looms large in this case and it reveals the absence of any bonafides on his part. For all these reasons, we reject the said argument also.

Accordingly, the appeal is dismissed without any order as to costs.

(Kurian Joseph, Judge.)

(T.R. Ramachandran Nair, Judge.)

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